IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 438 of 1984

in

SPECIAL CIVIL APPLICATIONNo 4895 of 1984

For Approval and Signature:

HON'BLE MR.JUSTICE R.K.ABICHANDANI
and
HON'BLE MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NIRMALA GURDIT SINGH WILKHOO

Versus

GPSC

Appearance:

1. LETTERS PATENT APPEAL No. 438 of 1984

MR K.M.PATEL WITH MR S.R. BRAHMBHATT for
the Appellant
MR N.J.SHAH for MR D.N. PATEL for Respondent No. 1
MR J.R. NANAVATI for Respondent No. 2
MR P.K. JANI for Respondent No. 3
RULE UNSERVED for Respondent No. 4

MR M.S.RAO, AGP for Respondent No. 5

CORAM : HON'BLE MR.JUSTICE R.K.ABICHANDANI
and
HON'BLE MR.JUSTICE K.M.MEHTA

Date of decision: 08/09/2003

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE R.K.ABICHANDANI for the Court)

1. The appellant challenges the order of the learned Single Judge made on 25-9-1984, rejecting her petition which was directed against the selection of the respondent No.2 to the post of Assistant Director (Lie-detection Unit) in the Gujarat State Services Class I and placement of the respondents Nos. 3 and 4 on the waiting list, and seeking a direction that the petitioner should be considered to have satisfied all the conditions prescribed by the respondent No.1 - Gujarat Public Service Commission for the post in question.

2. According to the petitioner, she had joined as a Senior Scientific Assistant (Gazetted Class II) in the Forensic Science Laboratory, Ahmedabad, after being selected by the Gujarat Public Service Commission on 30-4-1984. She was possessing the Doctorate Degree and had wide experience as a Senior Scientific Assistant, during which tenure, she was deputed for training in the Central Forensic Science Laboratory, New Delhi for a period of three weeks from 9th June 1984. During the course of that training, she acquired vital experience of handling polygraph machine and interrogation techniques.

2.1 Pursuant to the advertisement issued by the Gujarat Public Service Commission on 4th June 1984 for the post of Assistant Director (Lie-detection Unit) Class I (copy at Annexure "A" to the petition), the petitioner applied for the post and was interviewed on 22nd August 1984. As per the advertisement, preference was to be given to a candidate who had the experience of handling polygraph (lie-detector) and interrogation. According to the petitioner, in her application form, she had not mentioned about the training of handling polygraph machine, which she had undergone for three weeks from 9th June 1984 since it was subsequent to the making of the application. According to her, during the course of her training at New Delhi, she had handled polygraph (lie-detector) and undertaken interrogatory duties in

association with the Principal Scientific Officer and others. The petitioner annexed the certificate at Annexure "C' issued by the Directorate regarding her having completed the said training. She had also executed a bond that she would continue to serve the respondent No.5 for three years after return to duty from the training. It is alleged in paragraph 5 of the petition that, at the time of her interview by the respondent No.1 - Public Service Commission, the petitioner had informed the officers interviewing her about her having attended the familiarization programme on polygraph (lie-detection). However, she was not given any opportunity to furnish relevant particulars of such experience at that time.

2.2 It was the petitioner's case in paragraph 7 of the petition that, from amongst the candidates interviewed by the first respondent, the petitioner was the only candidate having the experience of polygraph and interrogation techniques. She had handed over a copy of the certificate to the interviewing officer at the start of the interview. It was contended: "The petitioner asserts that she was the only candidate having the `preferential qualification' and the respondent No.1 was bound to consider the petitioner on the basis of the above referred preferential qualification in (as per) clause 3 in the advertisement". However, in the result of the selection test notified on the notice board of the Commission on 31st August 1984, her name appeared at Srl. No.3 in the waiting list though she had much higher qualifications compared to the persons whose names were placed at Srl. Nos.1 and 2 in the waiting list. It was alleged in paragraph 8 of the petitioner: "This itself reflects the malafide, and favouritism of the first respondent in making selection in question". It was contended that selection of the respondent No.2 was in breach of the fundamental rights guaranteed to the petitioner under Article 16 of the Constitution as it was in breach of the eligibility qualifications laid down in the advertisement dated 4th June 1984 and therefore, liable to be set aside. The petitioner emphasized that she was relatively better qualified than the original respondents Nos. 2, 3 and 4, who did not possess the preferential experience for the post, as required by clause 3 of the advertisement. In paragraph 11 of the petition, it was contended that the petitioner was the only candidate who had fulfilled the preferential qualification clause in the advertisement and "the respondent No.1 was, therefore, bound to select the petitioner, other things being found equal". It was therefore contended that the selection of the respondents

Nos. 2, 3 and 4 should be quashed and the respondent No.1 - Public Service Commission may be directed to consider only the petitioner as having satisfied all the conditions mentioned in the advertisement. It was also alleged that the action of the respondent No.1 was high handed and guided by favouritism in selecting the respondent No.2, arbitrary and malafide.

3. The learned Single Judge, noting the main grievance of the petitioner which was to the effect that the selected candidate i.e. the respondent No.2 and the respondents Nos. 3 and 4, who were placed above her in the waiting list, did not possess the third requirement mentioned in the advertisement that preference shall be given to a candidate who had experience in handling polygraph (lie-detection) and interrogation, held that the interviews were held by an independent constitutional body like the Gujarat Public Service Commission, and that they were not to go merely by the advertisement, and that the judgement of the GPSC about the candidates would prevail and not the candidate's own opinion. It was noted that no malafides were attributed to any of the members of the Public Service Commission. Moreover, in an interview, several factors were normally required to be considered and it was for the Public Service Commission to consider them and the High Court would not sit in appeal over the judgement of the Public Service Commission. The learned Single Judge observed that the criteria of preference would only mean that, that it would be an added qualification and that, the mere feeling of the petitioner that something wrong had occurred, was not sufficient for interference by the High Court.

4. The learned counsel for the appellant contended that, as per the Assistant Director (Lie-Detection Section) Gujarat State Forensic Science Laboratory Recruitment Rules, 1981 framed under Article 309 of the Constitution of India, the eligibility criteria for appointment by direct selection to the post of Assistant Director, inter alia, provided in Rule 3(iii) that preference shall be given to a candidate who has experience of handling polygraph (Lie-Detector) and interrogation. It was submitted that, as per this statutory requirement, the respondent No.1 - Public Service Commission was bound to give preference to the petitioner, who alone had acquired the experience before her appointment. Even though she had acquired the experience after making of her application for the post in question, she had shown the certificate of experience to the members of the Public Service Commission, who were

interviewing her. Therefore, she was entitled to be appointed in preference to any other candidates who did not possess such preferential experience. It was also submitted that the petitioner had undergone training as contemplated by Rule 5 and had executed surety bond as required by Rule 7 of the said Rules. The learned counsel argued that, having regard to the object and purpose of the post in question, the candidate possessing the experience of handling polygraph ought to have been preferred, and she alone could have been selected in absence of any other candidate possessing such experience. It was also submitted that there was no written examination held for the purpose of selection and the selection was based only on oral interview. It was not shown by the respondent No.2 as to what criteria was adopted for the purpose of selection and whether separate marking was done by the members who interviewed the petitioner. Furthermore, there was no expert on the panel and no norms for selection were adopted by the Members of the Public Service Commission. The entire selection process was, according to the learned counsel, an eye-wash and was arbitrarily conducted. It was submitted that the respondent No.1 has not been able to demonstrate as to what considerations were applied while interviewing the candidates. From the record, he pointed out that the persons possessing Doctorate degree and higher experience were given less marks and submitted that the criteria professed does not seem to have been really applied. It was contended that the selection of the respondent No.2 was arbitrarily done and the fundamental right to equality in the matter of public appointment of the petitioner guaranteed by Article 16 of the Constitution was flagrantly violated by such a discriminatory and arbitrary process.

4.1 In support of his contentions, the learned counsel relied upon the following decisions :

[a] The decision of the Supreme Court in Government of Andhra Pradesh v. P.Dilipkumar and another, reported in (1993)2 SCC 310, was referred for pointing out that, in paragraph 13 of the judgement, the Supreme Court observed that the word `preference' as understood in ordinary parlance means preferring or choosing as more desirable, favouring or conferring a prior right. The Supreme Court held that preference was sought to be granted under Note 1 to post-graduates in the larger interest of the administration. It was observed that it was thought that on account of their higher mental equipment the quality of

performance that the State will receive from highly qualified engineers would be better and of a high order. If that was the objective, surely it would not be realised unless post-graduates are treated as a class and given preference en bloc over the graduates.

[b] The decision of the Supreme Court in Ashok Kumar Sharma v. Chander Shekhar, reported in 1993 (Supp) 2 SCC 611, was cited to point out that, while considering the question whether educational qualifications should be possessed on the date of submission of application form or on the date of interview, the Supreme Court held, in the facts of the case, that the requirement was fulfilled if they are possessed on the date of interview. In paragraph 15 of the judgement, the Supreme Court observed that it was in public interest that the interview was made as broad based as was possible on the basis of qualification, and that better candidates who were fully qualified on the dates of selection were not rejected, notwithstanding that the results of the examination in which they had appeared had been delayed for no fault of theirs.

[c] The decision of the Supreme Court in Praveen Singh v. State of Punjab, reported in AIR 2001 SC 152, was cited for the proposition that interview should not be the only method of assessment of the merits of candidates. The vice of manipulation cannot be ruled out in viva voce test. It was observed that, though interview undoubtedly is a significant factor in the matter of appointments, it plays a strategic role but it also allows creeping in of a lacuna rendering the appointments illegitimate. It is an important factor but ought not to be the sole guiding factor since reliance thereon only may lead to a "sabotage of the purity of the proceedings". The Court held that the recruitment to the post of Block Development and Panchayat Officer cannot be made on basis of viva voce test only. It was observed that, neither the job required mature personality nor the recruitment should be on the basis of interview only, having regard to the nature and requirement of the concerned jobs. It was noticed that the Service Commission itself had recognized a written test as also viva voce test. As per the scheme of the examination as given in information sheet, there would be four

papers for written test. It was held that the Service Commission in clear and categorical language recorded that 450 marks would be the total marks for the examination and out of which only 50 marks are earmarked for viva voce, it cannot be said that the Commission desired that these 50 marks would be relevant and crucial and the other 400 marks would be rendered totally, superfluous and of no effect at all.

5. The learned counsel appearing for the respondent No.2, who was the candidate selected, contended that the certificate which was sought to be relied upon by the petitioner does not show that she had handled the polygraph. Proviso to Rule 3(iii) of the said Rules contemplated experience of handling polygraph. The certificate only indicated that "Study and Familiarization" with the working of polygraph. It was also submitted that the certificate was not produced alongwith the application form, because, the qualifications were subsequently acquired by the petitioner. It was submitted that such subsequently acquired qualifications could not have been taken into account for the purpose of considering whether preference should be given to the candidate or not under the said proviso. The learned counsel further argued that the only contention that was raised by the appellant in the petition and before the learned Single Judge was that preference ought to have been given to the petitioner in view of her being an experienced candidate in handling polygraph as reflected from the certificate and other factual contentions which are now sought to be raised by an amendment in the memo of petition, cannot be countenanced. It was submitted that such factual contentions were not even on oath, because, they were incorporated in the memo of appeal. They are, therefore, not averments made on oath and cannot be relied upon. The learned counsel submitted that the respondent No.2 secured the highest marks and therefore, she was rightly selected by the Gujarat Public Service Commission, which was an independent body.

5.1 The learned counsel relied upon the following decisions in support of his contentions :

[a] The decision of the Supreme Court in in Secretary, A.P.Public Service Commission v. Y.V.V.R. Srinivasulu, reported in (2003)5 SCC 341 = Secretary, Andhra Pradesh Public Service Commission v. Y.V.V.R. Srinivasulu, reported in

J.T. 2003 (4) SC 208, was cited for the proposition that the preference on the basis of additional qualifications which was envisaged by Rule 5 of the Andhra Pradesh Labour Officers' Subordinate Service rules, 1985 had to be given only when the claims of all candidates who were eligible were taken for consideration and when anyone or more of them were found equally positioned, by using the additional qualification as a tilting factor in their favour vis-a-vis others in the matter of actual selection. In paragraph 10 of the judgement, the Supreme Court observed that : "The word `preference' envisaged in the Rules, in our view, under the Scheme of things and contextually also cannot mean, an absolute en block preference akin to reservation or separate and distinct method of selection for them alone. A mere rule of preference meant to give weightage to the additional qualifications cannot be enforced as a rule of reservation or rule of complete precedence. Such a construction would not only undermine the scheme of selection envisaged through the Public Service Commission, on the basis of merit performance, but also would work great hardship and injustice to those who possess the required minimum educational qualifications with which they were entitled to compete with those possessing additional qualification too, and demonstrate their superiority, merit wise and their suitability for the post. It is not to be viewed as a preferential right conferred even for taking up their claims for consideration.".

[b] The decision of this Court in Jenusan Textile v. Rajkot Municipal Corporation, reported in XL(1) GLR 460, was cited for the proposition that the contention not raised before the Single Judge cannot be allowed to be argued before the Letters Patent Bench.

[c] The decision of the Supreme Court in Ramabai Govind v. Raghunath Vasudeo, reported in AIR (39) 1952 Bombay 106, was relied upon for the proposition that, in a Letters Patent Appeal, it is not only the appellant but the respondent also who must be held to the arguments and the contentions which have been advanced before the court of appeal and therefore, it is not open to the respondent to raise a point which had not been urged before the court from the judgement of

which the appeal is preferred.

[d] The decision of the Bombay High Court in Sattappa Gurusattappa Hukeri v. Mahommedsaheb Appalal Hukeri, reported in AIR 1936 Bombay 227, was cited for the proposition that, in an appeal under the Letters Patent, the appellant was not entitled to be heard on points which had not been raised before the Judge from whose judgement the appeal had been preferred.

[f] The decision of the Supreme Court in Ashok Kumar Sharma v. Chander Shekhar, reported in (1997) 4 SCC 18, was cited for the proposition that, where applications are called for prescribing a particular date as a last date for filing the applications for appointment to the post, the eligibility of the candidates shall have to be judged with reference to that date and that date alone. A person who acquires the prescribed qualifications subsequent to such prescribed date cannot be considered at all. It was held that an advertisement or notification issued / published calling for applications constitutes a representation to the public and the authority issuing it, is bound by such representation and cannot act contrary to it.

[g] The decision of the Supreme Court in Bhupinderpal Singh v. State of Punjab, reported in AIR 2000 SC 2011, was cited for the proposition that the cut-off date by reference to which the eligibility requirement must be satisfied by the candidate seeking a public employment is the date appointed by the relevant service rules and if there be no cut-off date appointed by the rules, then such date as may be appointed for the purpose in the advertisement calling for applications; however, if there is no such date appointed, then the eligibility criteria shall be applied by reference to the last date appointed by which the applications have to be received by the competent authority. (see paragraph 13 of the judgement).

6. The learned counsel appearing for the respondent No.1 - Gujarat Public Service Commission submitted that the selection of the candidate was made by an independent body like the Public Service Commission and since no malafides were alleged against any of the members of the Selection Committee, there was no reason to doubt the

genuineness of the selection of respondent No.2. It was submitted that preference contemplated by the proviso to Rule 3(iii) did not have the effect of excluding other candidates who were otherwise eligible under the said Rule. It was submitted that the learned Single Judge had rejected the petition summarily and therefore, the Commission had no opportunity to place on record the fact that the selection was done by the Committee by assigning marks to each of the candidates who were interviewed. In view of the amendment made in the memo of the Letters Patent Appeal in which factual allegations were made, the Commission filed an affidavit-in-reply on which the counsel relied for contending that the preference for additional qualification was relevant only when other things were equal and two or more candidates were at par on the basis of their performance at the interview.

6.1 The learned Assistant Government Pleader appearing for the respondent No.1 relied upon the following decisions in support of his contentions :

[a] The decision of the Supreme Court in Shanbaggakannu v. Muthu Bhattar, reported in AIR 1971 SC 2468, was cited for the proposition that, it was not open to the Division Bench of the High Court in Letters Patent Appeal to allow the question for consideration to be raised for the first time and that also without any amendment of the pleadings being allowed and without the other party having a proper opportunity to meet the case. In that case, the appeal arose from a suit challenging the validity of a gift.

[b] The decision of the Supreme Court in Rekha Chaturvedi (SMT) v. University of Rajasthan, reported in 1993 Supp (3) SCC 168, was cited for the proposition that in absence of a fixed date indicated in the advertisement / notification inviting applications with reference to which the requisite qualifications should be judged, the only certain date for scrutiny of the qualifications will be the last date for making the applications.

[c] The decision of the Supreme Court in Secretary (Health) Department of Health & F.W. v. Dr. Anita Puri, reported in (1996)6 SCC 282, was cited for the proposition that when an advertisement stipulates a particular qualification as the minimum qualifications for the post and further stipulates that preference

> would be given for higher qualifications, the only meaning it conveys is that some additional weightage has to be given to the higher candidates with higher qualifications. It cannot be construed to mean that a person with a higher qualification is automatically entitled to be selected and appointed. In adjudging the suitability of person for the post, the expert body like Public Service Commission in the absence of any statutory criteria has the discretion of evolving its mode of evaluation of merit and selection of the candidate. The competence and merit of a candidate is adjudged not on the basis of the qualification he possesses but also taking into account the other necessary factors like career of the candidate throughout his educational curriculums, experience in any field in which the selection is going to be held, his general aptitude for the job to be ascertained in course of interview, extracurricular activities like sports and other allied subjects, personality of the candidate as assessed in the interview and all other germane factors which the expert body evolves for assessing the suitability of the candidate for the post for which the selection is going to be held. (See paragraph 7 of the judgement).

7. It is clear from the memo of the writ petition that the petitioner based her case on the proviso to Rule 3(iii) of the said Rules, which was also reflected in the advertisement inviting applications and as per which, preference was to be given to a candidate who had experience of handling polygraph (lie-detector) and interrogation). Admittedly, the petitioner had not acquired the experience as on the date on which she made the application, though, during the interview, she brought to the notice of the members of the Committee the certificate dated 28-7-1984 showing that she had completed the training for a period of three weeks with effect from 9-7-1984 for study and familiarization of the working of polygraph at the Central Forensic Science Laboratory, New Delhi. The advertisement for the post, a copy of which is at Annexure "A" to the petition, shows that the applications were invited so as to reach the Commission's office on or before 28th June 1984. There was admittedly no other date prescribed as on which the qualifications were required to be considered to have been fulfilled. Therefore, the last date of making of the applications for the post was the cut-off date in respect of the essential qualifications, including the

experience of handling polygraph. The fact that the relevant date for considering whether the candidates possessed the essential qualifications was in the present case 28th June 1984 could hardly be disputed in view of the clear pronouncements of the Apex Court (See Ashok Kumar Sharma's case (supra) para 5.1(f) and Bhupender Pal's case (supra) para 5.1(g). In absence of any other specified date, the last date for receiving the applications should be taken to be the relevant date for the purpose of ascertaining whether the candidate applying pursuant to the advertisement was qualified or not. Therefore, the very basis on which the petitioner put up her claim falls to the ground. It is evident from the judgement of the learned Single Judge that this was the main contention which was raised before the Court.

8. Apart from the fact that the petitioner did not possess the experience relatable to proviso to Rule 3(iii) of the said Rules, as on the last date of the making of the application and was, therefore, not entitled to claim any preference under the said proviso, it is clear that, even in cases where the preference provision was attracted, it did not entitle the candidate to claim the position only on that basis irrespective of the performance of other candidates who possessed requisite qualifications for competing with the candidates having such additional qualifications. As noted above, it is a settled legal position. (See Secretary, Andhra Pradesh Public Service Commission (supra) para 5.1 (g), in which, the Supreme Court held : "The word `preference' envisaged in the Rules, in our view, under the Scheme of things and contextually also cannot mean, an absolute en block preference akin to reservation or separate and distinct method of selection for them alone. A mere rule of preference meant to give weightage to the additional qualifications cannot be enforced as a rule of reservation or rule of complete precedence". It was held that, preference had to be given only when the claims of all candidates who were eligible were taken for consideration and when anyone or more of them were found equally positioned, by using the additional qualification as a tilting factor in their favour vis-a-vis others in the matter of actual selection. (See also Dr.Anita Puri's case (supra para 6.1(c)).

9. Apart from the fact that the contentions which were not raised before the learned Single Judge and were sought to be raised by an amendment in the Letters Patent Appeal, cannot be allowed to be raised in view of the pronouncements referred to hereinabove, particularly of

the Supreme Court in Shanbaggakannu (supra para 6.1 (a)), and the High Court of Bombay, in case of Sattappa Gurusattappa Hukeri (supra para 5.1(d)), it appears that, in the present case, there is no valid reason to suspect the genuineness of the interview process. The Public Service Commission has, in the affidavit-in-reply, stated in paragraph 6 that, considering the eligibility criteria like educational qualification, experience, age etc., the assessment of candidates was carried out on the basis of overall personality, inter-personal interaction, reacting to different situation, ability to express and such other merits and general performance of candidates, and that, based on her performance as per the result which was declared, the respondent No.2 got 60 marks out of 80 marks, while the petitioner got only 52 marks. It appears that the respondent No.3 was given 55 marks and the respondent No.4 was given 54 marks. The contention that the candidates having doctorate degree were given less marks is misconceived, because, a doctorate degree was not the only basis on which the marks were to be given. Moreover, there was one other candidate, who had doctorate degree, who could secure only 35 marks. Therefore, the petitioner could not have claimed higher marks only on the basis of a doctorate degree. As held by the Supreme Court in case of Dr.Anita Puri (supra), it is too well settled that when a selection is made by an expert body like the Public Service Commission which is also advised by experts having technical experience and high academic qualifications in the field for which the selection is to be made, the Courts should be slow to interfere with the opinion expressed by experts unless allegations of malafide are made and established. It would be prudent and safe for the Courts to leave the decision on such matters to the experts who are more familiar with the problems they face than the Courts.

10. In view of the above, we are satisfied that the learned Single Judge, in the facts of the case, rightly adopted a prudent course by not interfering with the outcome of the selection process held by the expert body. The appeal is, therefore, dismissed. There shall be no order as to costs.

[R.K.ABICHANDANI, J.]

[K.M.MEHTA, J.]

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